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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/047,579	01/15/2002	Edward T. Huxel	5000 508-8	7412

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KANSAS CITY, MO 64106-2140

EXAMINER

BECKER, DREW E

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 04/10/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/047,579

Applicant(s)

HUXEL, EDWARD T.

Examiner

Drew E Becker

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 07 January 2002.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-12 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-12 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 2.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

## **DETAILED ACTION**

### ***Priority***

1. This application lacks the necessary reference to the prior application. A statement reading "This is a continuation-in-part of Application No. 09/659,530, filed September 12, 2000." should be entered following the title of the invention or as the first sentence of the specification. Also, the current status of all nonprovisional parent applications referenced should be included.

### ***Drawings***

2. Figure 11 should be designated by a legend such as --Prior Art-- because only that which is old is illustrated. See MPEP § 608.02(g). A proposed drawing correction or corrected drawings are required in reply to the Office action to avoid abandonment of the application. The objection to the drawings will not be held in abeyance.

### ***Information Disclosure Statement***

3. The IDS of paper no. 2 is objected to since one of the "Other Documents", Bailey's Industrial Oil and Fat Products, does not include a publishing date.

### ***Double Patenting***

4. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA

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1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

5. Claims 1-12 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 12-15, 20-22, 26-28 of U.S. Patent No. 09/659,530 in view of Miller et al [Pat. No. 5,431,945]. It would have been obvious to one of ordinary skill in the art to include the fat types of Miller et al since these types of fats were commonly used in solidified form.

#### ***Claim Objections***

6. Claim 10 is objected to because of the following informalities: it ends with a comma. Appropriate correction is required.

#### ***Claim Rejections - 35 USC § 112***

7. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

8. Claims 8-12 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

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9. Claims 8 and 10 recite "its solid phase". It is not clear what component "it" is.
10. Claim 11 recites "where said first layer of a second fat and said second layer of a second fat comprise different fats". It is not clear how "a second fat" can actually be two different substances.

***Claim Rejections - 35 USC § 102***

11. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

12. Claim 7 is rejected under 35 U.S.C. 102(b) as being rejected by Miller et al [Pat. No. 5,431,945].

Miller et al teach a method of forming fat flakes by selecting a liquid mix comprising fat with a Solids Fat Index below the Agglomeration Boundary (column 6, lines 15-20 & 33-37), as defined by applicant on page 8, lines 13-17 of the specification, dispensing a layer of the liquid mix onto a horizontal flat work surface (column 6, lines 52-54), and adjusting the temperature of the work surface to allow the liquid mixture to solidify (column 6, lines 55-64).

***Claim Rejections - 35 USC § 103***

13. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

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(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

14. Claims 1-6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Miller et al as applied above, in view of Virtanen [Pat. No. 6,063,423].

Miller et al teach the above mentioned concepts as well as scraping away the formed solid (Figure 5, #60) and adding additional components such as salt, spices, milk solids, annatto, and butter oils (column 5, lines 8-29). Miller et al do not recite adding the solids after the liquid mix has solidified. Virtanen teaches a method of producing a food product by adding solids such as salt, sugar, and spices (column 3, line 10) to a cooled, solidified food product (column 2, lines 34-44). It would have been obvious to one of ordinary skill in the art to incorporate the separate application of solids taught by Virtanen into the invention of Miller et al since both are directed to methods of solidifying liquids, since Miller et al already included the use of salt and spices (column 5, lines 19-28), since this would have been done during the course of normal experimentation, since some flavor and color components are heat sensitive and would react adversely to the mixing conditions of Miller et al (column 6, line 36), and since solid food components, such as salt, were commonly added to food products while in a solid state as shown by Virtanen.

15. Claims 8-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Miller et al, in view of Virtanen, as applied above, and further in view of Lansbergen et al [Pat. No. 6,312,752].

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Miller et al and Virtanen teach the above mentioned concepts. Virtanen also teaches applying a layer of liquid fat to a cooled, solidified food product (column 2, lines 34-44). Miller et al and Virtanen do not teach the second fat having a melting point of 120°F or more and the second fat having a solids fat index profile above the agglomeration boundary. Lansbergen et al teach a method of making fat flakes by adding savory components, such as olive oil, to the flakes (column 3, line 22), the use of different combinations of fats including palm oil with a melting point of 136.4°F (column 4, lines 25-56), and the fats being above the agglomeration boundary (Table 1, columns N10 & N20). It would have been obvious to one of ordinary skill in the art to incorporate the second fats of Lansbergen et al into the invention of Miller et al since both are directed to methods of making fat flakes, since Miller et al already included additional ingredients (column 5, lines 3-28), since fat flakes commonly included additional fats as shown by Lansbergen et al (column 4, lines 25-56), and since additional fats would have provided a means to adjust the physical properties and taste attributes of the fat flakes as shown by Lansbergen et al (column 3, lines 1-25).

16. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. R. Smith-Johansen et al [Pat. No. 2,491,837], Ochs [Pat. No. 6,370,886], EP 0165720A1, Wright [Pat. No. 6,488,973], and Player et al [Pat. No. 4,762,725] teach methods of making fat-based products and solidifying liquids.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Drew E Becker whose telephone number is 703-305-0300. The examiner can normally be reached on Monday-Thursday 7am-5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 703-308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9310 for regular communications and 703-872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1495.

A handwritten signature in black ink, appearing to read "Drew Becker", with a long horizontal flourish extending to the right.

April 5, 2003

Drew E Becker  
Examiner  
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